IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. 1:17-cr-02946-JCH

ALBERT PULIDO,

Defendant.

MEMORANDUM OPINION AND ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

On October 24, 2017, Defendant Albert Pulido was charged in a one-count indictment with being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1). *See* Redacted Indictment, ECF No. 12. On December 1, 2018, Mr. Pulido moved to suppress the gun and ammunition that Albuquerque police officers retrieved after his encounter with them on the evening of September 7, 2017, claiming that the evidence was obtained in violation of the Fourth Amendment. *See* Def.'s Mot. to Suppress, ECF No. 34. The Court held a hearing on the motion on January 31, 2019. After carefully considering the motion, briefs, evidence from the hearing, and relevant law, the Court concludes that the motion should be denied.

I. FACTUAL BACKGROUND

On September 7, 2017 at 7:10 PM, a 911 caller reported that about 30-minutes beforehand she observed a number of people inside a neighboring vacant house in Southeast Albuquerque. *See* Mot. Hr'g. Tr. 10:12; 10:21-25 – 11:1-4; 19:20-23. The vacant house had been previously "yellow-tagged" she said, but now about eight previous tenants were in the house. *Id*. at 10:21-24. She told the dispatcher that they were involved in shooting a person just days before and that they were

known drug dealers. *Id.* at 11:2-4; 11:22-23. It was unknown whether the suspects were armed. *Id*. at 18:9-15.[1] The caller told the dispatcher her name, confirmed her telephone number, and said she was willing to follow-up with more information for officers.. *Id*. at 10:11-12; 36:16-25.

Six-minutes later, two uniformed APD officers, Jonathan Lambert and Pablo Hernandez arrived on the scene in marked police cars. Officer Lambert did not remember seeing a yellow-tag on the house. *Id*. at 42:21-23. But his understanding was that a yellow-tagged house meant that the structure was "substandard" and that "no one was supposed to be inside of it," otherwise the person would be criminally trespassing. *Id*. at 39:2-9; 10:22:23. On arrival the officers briefly surveilled the property at a distance using binoculars and saw Mr. Pulido and others moving property out of the house and into parked cars in front of the house. *Id*. at 12:21-25 – 13:1-5. Officers did not know who owned the cars parked in front. *Id*. at 38:16-19. Officer Lambert said that "to me, it looked like residential burglary." *Id*. at 13:24-25.[2]

After wrapping up surveillance, the officers drove around side streets, making their way to the house from the north so that their police cars pointed southbound along with the parked cars in front of the house. *Id.* at 13:6-9. Officers could therefore chase the suspects if they fled in the vehicles without having to encounter them "head-on," which Officer Lambert described as

[1] In its briefing the Government stated that the caller additionally remarked that she had observed the people in the house coming and going at all hours of the night, use knives in odd ways, and that she had witnessed late night transfers of stolen items. *See* Govt.'s Resp. Br., ¶ 2 at 2, ECF No. 35. However, the Government provided no record evidence of these allegations and thus the Court does not credit them as true.

[2] Mr. Pulido contends that in his post-arrest report Officer Lambert omitted that he saw Mr. Pulido carrying items from the house. True enough, Officer Lambert wrote only that he "arrived and observed … Albert Pulido, walk out of the front door of the residence, walk to a vehicle, and open the door." *See* Ex. to Def.'s Reply Br., ECF No. 36-1. But as the Court explains, *infra*, even assuming that Officer Lambert did not observe Mr. Pulido carrying any items from the home, Officer Lambert still had reasonable suspicion to believe that Mr. Pulido was connected to criminal activity and possibly armed.

perilous. *Id*. at 13:9-13. Officer Lambert exited his vehicle while Mr. Pulido approached a nearby vehicle parked in front of the house. *Id*. at 14:3-5. Another officer arrived on the scene. *Id*. at 24:24.

Officer Lambert's lapel camera captures the encounter between him and Mr. Pulido. Mr. Pulido is seen standing next to the driver's side of one of the parked cars as Officer Lambert tells him "can you just step over here?" waving Mr. Pulido towards him. *See* Govt.'s Ex. 1A. Three seconds later Officer Lambert told Mr. Pulido, "you can just walk over here," again motioning Mr. Pulido towards him with his hand, while another officer said, "over here, sir." *Id*. During this exchange, Officer Lambert used normal speech, did not appear aggressive, and kept his firearm holstered. *See id*. The exchange took place in daylight in front of Mr. Pulido's associates, and officers did not switch on police sirens. *See id*.; Mot. Hr'g Tr. at 14:22-25 – 15:1.

After Officer Lambert's second statement "you can just walk over here," Mr. Pulido walked towards the rear of the car and immediately put his hands behind his back, assuming the position of arrest. *See* Govt.'s Ex. 1A. Officer Lambert testified that this reaction was "abnormal" because he did not ask Mr. Pulido to do that. Mot. Hr'g Tr. at 15:12-17. It also made him feel that Mr. Pulido was possibly armed and "didn't want to be seen reaching for" a weapon. *Id*. at 15:22-24.

Officer Lambert's lapel camera then shows the officer approaching Mr. Pulido, asking him if anyone else was in the car, telling Mr. Pulido that he was going to pat him down, and holding together Mr. Pulido's wrists. *See* Govt.'s Ex. 1A. No handcuffs were used. Before Officer Lambert even patted-down Mr. Pulido, Mr. Pulido told the officer that he had a pistol in his waistband and a box of bullets in his pocket. *See id*.

Mr. Pulido contends that the entire encounter between him and officers was a seizure in violation of the Fourth Amendment because Officer Lambert lacked sufficient facts to establish probable cause or reasonable suspicion that Mr. Pulido was engaged in criminality.

II. ANALYSIS

The Fourth Amendment prohibits unreasonable seizures by law enforcement officers. *See* U.S. Const. amend. IV. There are "three categories of police-citizen encounters: (1) consensual encounters which do not implicate the Fourth Amendment; (2) investigative detentions which are Fourth Amendment seizures of limited scope and duration and must be supported by a reasonable suspicion of criminal activity; and (3) arrests, the most intrusive of Fourth Amendment seizures and reasonable only if supported by probable cause." *United States v. Lopez*, 443 F.3d 1280, 1283 (10th Cir. 2006). Here, the Government argues that the interaction between Mr. Pulido and Officer Lambert was either consensual or an investigative detention supported by a reasonable suspicion of criminal activity. The Court addresses each theory in turn.

A. The encounter between Mr. Pulido and officers was voluntary

"A voluntary encounter involves the voluntary cooperation of a citizen with noncoercive questioning. Voluntary encounters are not considered seizures within the meaning of the Fourth Amendment[.]" *United States v. Laboy*, 979 F.2d 759, 798 (10th Cir. 1992). "[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions." *Florida v. Bostick*, 501 U.S. 429, 434 (1991). "To constitute a seizure, an encounter between an officer and a citizen must involve the use of physical force or show of authority on the part of the officer such that a reasonable person would not feel free to decline the officer's requests or terminate the encounter." *Lopez*, 443 F.3d at 1283. "As long as a reasonable innocent person, as opposed to a person knowingly carrying contraband, would feel free to leave, such encounters are consensual

and need not be supported by reasonable suspicion of criminal activity." *Laboy*, 979 F.2d at 798. Courts examine the following "several factors that could lead a reasonable innocent person to believe that he is not free to disregard the police officer," including:

> the threatening presence of several officers; the brandishing of a weapon by an officer; some physical touching by an officer; use of aggressive language or tone of voice indicating that compliance with an officer's request is compulsory; prolonged retention of a person's personal effects such as identification and plane or bus tickets; a request to accompany the officer to the station; interaction in a nonpublic place or a small, enclosed space; and absence of other members of the public.

United States v. Benard, 680 F.3d 1206, 1211 (10th Cir. 2012). "Although no single factor is dispositive, the strong presence of two or three factors may be sufficient to support the conclusion a seizure occurred." *Lopez*, 443 F.3d at 1284-85 (internal quotations and citations omitted).

Here, no factors have a "strong presence," *id*., when applied to the facts. Officer Lambert never threatened or physically touched Mr. Pulido until the pat-down search. There is no indication that Officer Lambert brandished his weapon. Officer Lambert spoke in a nonconfrontational, conversational tone of voice. In the Tenth Circuit's case *United States v. Sanchez*, 89 F.3d 715, 718 (10th Cir. 1996) the suspects were not seized when a police officer yelled across a parking lot to the suspects "if they would come over." Likewise, the defendant was not seized in *Laboy*, 979 F.2d at 799 when an undercover officer waved at the defendant, motioning him to cross the street towards the officer. Applying these precedents, Officer Lambert's statements "can you just step over here?" and "you can just walk over here," echoed by another officer's statement, "over here, sir," did not seize Mr. Pulido. Officer Lambert never requested or obtained any of Mr. Pulido's documents or personal effects. The encounter occurred in daylight on a public residential street. Officers parked behind the vehicle Mr. Puldio was seen entering and exiting and did not obstruct

his vehicle or prevent him from driving away. *See Sanchez*, 89 F.3d at 718. On these facts, a reasonable person would have felt free to terminate the encounter with Officer Lambert.

B. Reasonable suspicion supported officers' investigatory detention of Mr. Pulido

Of course, "what may begin as a consensual encounter may change to an investigative detention if the police conduct changes and vice versa." *Lopez*, 443 F.3d at 1284 (quotations and citations omitted). The Government concedes that once Officer Lambert grabbed Mr. Pulido's hands and told Mr. Pulido he was going to pat-down, Mr. Pulido was seized. This type of "investigative detention, also known as a "*Terry* stop," *United States v. Hernandez*, 847 F.3d 1257, 1267–68 (10th Cir. 2017), is allowed only "when a law enforcement officer has a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Navarette v. California*, 572 U.S. 393, 396 (2014). An officer may conduct an investigative stop "even though probable cause to arrest is lacking." *Terry*, 392 U.S. at 22. Under *Terry* "a two-pronged test [is used] to determine the reasonableness of investigatory detentions. For an investigatory detention to be reasonable it must be 'justified at its inception' and the officers [sic] actions must be 'reasonably related in scope to the circumstances which justified the interference in the first place.'" *United States v. Madrid*, 713 F.3d 1251, 1255–56 (10th Cir. 2013) (citing *Terry*, 392 U.S. at 20)).[3]

For an investigatory stop to be justified at its inception, officers must have "specific and articulable facts and rational inferences drawn from those facts [that] give rise to a reasonable suspicion a person has or is committing a crime." *Madrid*, 713 F.3d at 1256 (citations omitted). "The reasonable suspicion analysis does not consider each of an officer's observations in isolation,

[3] The only issue is whether Officer Lambert's investigatory detention of Mr. Pulido was justified at its inception. Mr. Pulido makes no arguments concerning the second-prong under *Terry*.

but rather is based on the totality of the circumstances, taking into account an officer's reasonable inferences based on training, experience, and common sense." *United States v. Garcia*, 751 F.3d 1139, 1143 (10th Cir. 2014) (quotation marks and citations omitted). Reasonable suspicion "need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *United States v. Fager*, 811 F.3d 381, 386 (10th Cir. 2016) (quotation marks and citations omitted). "[A]s long as [the detaining officer] has a particularized and objective basis for suspecting an individual may be involved in criminal activity, he may initiate an investigatory detention even if it is more likely than not that the individual is *not* involved in any illegality." *Madrid*, 713 F.3d at 1256 (citations omitted).

The brief and minimally intrusive seizure of Mr. Pulido was supported for two main reasons. First, the 911 caller's highly reliable information created reasonable suspicion that Mr. Pulido was burglarizing a home or trespassing. Second, Mr. Pulido's unusual behavior of assuming the position of arrest, plus the information furnished from the 911 caller that the suspects were known drug dealers involved in a recent shooting reasonably conveyed to Officer Lambert that Mr. Pulido was armed and dangerous.

Although anonymous tips raise difficult Fourth Amendment questions because they rarely allow authorities to assess the informant's veracity, reliability, or basis of knowledge, there are situations when an anonymous tip, suitable corroborated, exhibits sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop. *See United States v. Copening*, 506 F.3d 1241, 1246 (10th Cir. 2007). "A confidential tip may justify an investigatory stop if under the totality of the circumstances the tip furnishes both sufficient indicia of reliability and sufficient information to provide reasonable suspicion that criminal conduct is, has, or is about to occur." *Madrid*, 713 F.3d at 1258. "The determination of [w]hether a tip provides reasonable suspicion …

is case-specific, and no single factor is dispositive." *Id.* (quotations and citations omitted). Relevant factors include:

> (1) whether the informant lacked 'true anonymity' (i.e., whether the police knew some details about the informant or had means to discover them); (2) whether the informant reported contemporaneous, firsthand knowledge; (3) whether the informant provided detailed information about the events observed; (4) the informant's stated motivation for reporting the information; and (5) whether the police were able to corroborate information provided by the informant.

Id.

Nearly all of these factors suggest that the facts gave sufficient reliability to the 911 caller for Officer Lambert to rely on her information and reasonably suspect Mr. Pulido of wrongdoing. For one, the caller was not anonymous. She told the dispatcher her name, confirmed her telephone number, and said she was willing to follow-up with more information for officers, so officers had means to confirm her identity and information. *See Copening*, 506 F.3d at 1247 ("[t]he fact the caller provided authorities some basis for discovering his identity makes it is less likely his tip was phony."). She reported first-hand information that she observed a mere 30 minutes earlier. *See United States v. Conner*, 699 F.3d 1225, 1229 (10th Cir. 2012) (anonymous 911 caller's "immediate, firsthand knowledge added to the reliability of his statements."). The 911 caller's information provided officers reasonable suspicion that either criminal trespass or residential burglary was afoot at the house. Although there is a dispute about whether the vacant house was in fact yellow-tagged, Officer Lambert was told that the house was yellow-tagged, and he understood this to mean that "no one was supposed to be inside of it," lest they be criminally trespassing. On the officers' arrival, the caller's observations of seeing several people in the house was confirmed by officers' surveillance. *See id.* (tipster's call reliable where officers discovered a vehicle in the precise location described by the caller.). The caller did not state her motivation for reporting her information. But much like the 911 caller in the Tenth Circuit's case *Conner*, 699

F.3d at 1230 "the fact that [she] provided [her] name and address to the 911 operator suggests that [she] was acting as a concerned citizen rather than a 'malicious tipster." In sum, the caller's information provided the requisite indicia of reliability.

Against the backdrop of the 911 caller's reasonably trustworthy information, Officer Lambert's frisk of Mr. Pulido was justified for the second reason that he could reasonably suspect Mr. Pulido was armed and dangerous. *Terry* allows "a reasonable search for weapons for the protection of the police officer," 392 U.S. at 27. During an investigative detention, "[p]olice officers are authorized to take reasonable steps necessary to secure their safety and maintain the status quo." *United States v. Gama-Bastidas*, 142 F.3d 1233, 1240 (10th Cir.1998). A pat-down, or "frisk" is one way to maintain the status quo so long as officers have "an articulable and reasonable suspicion that the person is armed and dangerous." *United States v. Garcia*, 459 F.3d 1059, 1063–64 (10th Cir. 2006) (citations and quotations omitted). "The reasonable suspicion needed to justify a pat-down search need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *Garcia*, 751 F.3d at 1142–43 (10th Cir. 2014) (quoting *United States v. Arvizu*, 534 U.S. 266, 274 (2002)). Under this standard, the Tenth Circuit has explained that a pat-down of a suspect is permitted "[e]ven when an officer ha[s] limited specific information leading him to believe that [an individual] was armed or dangerous and no knowledge of the individual's having possessed a weapon." *Garcia*, 751 F.3d at 1142.

Officer Lambert's testimony at the suppression hearing indicated that he possessed a particularized basis for suspecting that Mr. Pulido was armed. As the officer explained at the hearing, his professional experience taught him that during residential burglary investigations, "individuals involved … who are caught in the act might try to avoid apprehension by using

violence or weapons." Mot. Hr'g Tr. at 16:11-14. Of course, Officer Lambert did not know for certain if the house was being burglarized or whether Mr. Pulido was involved. But he encountered Mr. Pulido against the backdrop of the 911 caller's reliable tip and his observation of Mr. Pulido and others moving items from the home. As he said, "it looked like residential burglary," and he was therefore justified in believing that Mr. Pulido could be armed and dangerous. *Id*. at 13:24-25. In *Terry* itself the Supreme Court found that the officer had a reasonable belief that three individuals "were contemplating a daylight robbery – which, it is reasonable to assume, would be likely to involve the use of weapons – and nothing in their conduct [during the encounter] gave [the officer] sufficient reason to negate that hypothesis," and that the officer was justified in conducting a pat down search of the individuals. 392 U.S. at 28. *See United States v. Snow*, 656 F.3d 498, 501 (7th Cir. 2011) ("Reasonable suspicion that someone has committed a burglary typically gives rise to a reasonable suspicion that the person might be armed.").

Plus, Mr. Pulido's unusual reaction upon encountering officers bolstered Officer Lambert's reasonable suspicion that he might be armed and dangerous. The Tenth Circuit has referred to "the circumstances under which a person responding to the arrival of police will raise suspicion of wrongdoing." *United States v. Briggs*, 720 F.3d 1281, 1287 (10th Cir. 2013). In *Briggs*, for example, the defendant aroused police reasonable suspicion of criminality where he evaded police by changing direction, quickened his pace, repeatedly looked over his shoulder, reached for his waistline suggesting he had a gun, and acted nervous upon contact with police. 720 F.3d at 1292. And somewhat more analogous to the facts of this case, in *United States v. Rice*, 483 F.3d 1079, 1082 (10th Cir. 2007), one factor that lent the officer reasonable suspicion to believe that the defendant was armed and dangerous was his reaction of exiting his vehicle on the officer's

request and then immediately assuming the position for a weapons search by placing his hands on top of the car even though, as here, the officer had not requested a search.

Mr. Pulido's response of voluntarily assuming the position of arrest was "abnormal," Officer Lambert said, and not something he was used to. *Id*. at 15:12-18. It led him to believe that Mr. Pulido could have had "a lot of interaction with police," or that someone in Mr. Pulido's shoes would "think they should do that, or if they have something they don't want to be seen reaching for." *Id*. at 15:18-21. Officer Lambert's suspicions were justified. *See Rice*, 483 F.3d at 1085. Taken together with the facts relayed by the 911 caller's accurate information, her statement that the suspects were involved in a recent shooting, and Mr. Pulido's reaction when he encountered the officer, Officer Lambert was justified for his own safety in conducting a pat-down search of Mr. Pulido's person.

III. CONCLUSION

IT IS THEREFORE ORDERED that Mr. Pulido's Motion for Suppression of Evidence **[ECF No. 34]** is **DENIED**.

IT IS SO ORDERED.

United States District Judge
Judith C. Herrera